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81-1034

No.

IN THE

Supreme Court of the United States

STATE OF NEW MEXICO, ex rel RICHARD ROCK,
Petitioner,

v.

HON. HARRY E. STOWERS, JR.,
Respondent.

Appeal From The Supreme Court of the State of New Mexico

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Do the State Courts of New Mexico have jurisdiction for a paternity case filed by a full-blooded Navajo mother who is registered as a member of the Navajo tribe and who seeks to establish paternity for her child whom she enrolled as a member of the tribe when paternity is claimed as to a non-Indian citizen of the State of New Mexico who denies paternity?

2. Does the action of the State Court in granting jurisdiction in a paternity action for a Navajo mother and a Navajo child interfere with the self-governing rights of the Navajo nation and thus violate the status of the Navajo nation tribe of Indians which was recognized by virtue of the fact that the Navajo nation was a party to the Treaty of 1868 and recognized as such by the United States of America?

3. Does the United States of America Department of Interior regulation which expressly states that paternity actions shall be litigated in Tribal Courts, bar jurisdiction by the State Court over Indian paternity suits? Does the public policy of the Indian Child Welfare Act require that the paternity action herein should be within the jurisdiction of the Trial Court?

4. Does the Navajo Tribe Law which expressly states that paternity actions shall be litigated in Tribal Court bar an assumption of jurisdiction by New Mexico State Courts for a Navajo mother who was registered as a member of the Navajo nation?

5. Does the Fifth Amendment right against self-incrimination apply to a paternity action brought under a New Mexico statute, which statute creates a criminal cause of action with provisions for imprison-

ment and fines for non-support and where the allegations of the paternity action if proven would provide the specific proof required for criminal conviction?

LIST OF PARTIES INVOLVED

ESTHER ANTONIO who was the Plaintiff in the action in District Court, Bernalillo County, New Mexico.

RACHEL ANTONIO is the Navajo Child and the subject matter of the Paternity action.

THE HONORABLE HARRY E. STOWERS, Judge of the District Court for Bernalillo County, New Mexico was the respondent in the Supreme Court of New Mexico Writ of Prohibition and is an appellant in this action.

RICHARD ROCK is the appellant herein and Petitioner for the Writ of Prohibition to the Supreme Court of New Mexico and the Defendant in the Bernalillo County, New Mexico State Court.

The Supreme Court of the State of New Mexico is the Court which entered the denial of the Writ of Prohibition.

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JURISDICTIONAL STATEMENT

JURISDICTION

Jurisdiction is asserted under 28 U.S.C. § 1257 (1) (2) (3). The case in the Supreme Court of New Mexico was an original proceeding in Prohibition in the highest court of the State of New Mexico, and is a final judgment. *Fisher* v. *Dist. Ct. of Montana,* 424 U.S. 382, 47 L.Ed. 2d 106, 96 S.Ct. 953 (1976).

The Supreme Court of New Mexico denied relief to the Petitioner on the Petition for Writ of Prohibition on August 19, 1981. The Notice of Appeal was filied in the Supreme Court of the State of New Mexico on September 1, 1981.

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

1. Treaty of 1868 between the United States of America and the Navajo Indians. Said treaty is set out in the Appendix 2a because of its length.

2. The following provisions of the Constitution of the United States of America is involved in this Appeal: Article I, Section 8, provides that "The Congress shall have power . . . To regulate Commerce . . . with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs.

3. Amendment V of the Constitution of the United States: "No person . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

4. The provisions of the following Statute of the United States is involved, 28 USCS § 1257, State Courts; appeals; certiorari: Final judgments or decrees rendered by the highest court of a State in which a decision could be had, many be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is

drawn in question or where the validity of a State statute is drawn in question or on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.

5. The following provision of the Enabling Act for the State of New Mexico is involved in this Appeal. New Mexico statutes 1978 Annotated, Historical Documents, Volume I, Page 106: Second. That the people inhabitating said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States.

6. The following regulation of the Department of the Interior is involved in the Petition: 25 C.FR. § 11.30 states: "The court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child."

7. The following provision of the Navajo Tribal code is involved: "By resolution CJA-1-5, the Navajo Tribal Council adopted as Tribal Law the regulation

of the Department of the Interior contained in 25 C.F.R. § 11.30 which states: The court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child."

8. The following Statutory Provision of the State of New Mexico, Sections of Article V, Illegitimacy and Support, N.M.S.A. 1978, 40-5-1, et. seq., are involved: These provisions are set out in the Appendix 43a because of their length.

9. The following statute of U.S. 25 U.S.C. 1901, et. seq., are involved in this Appeal. Section 1901, subdivision (2) (3) (4) and (5).

§ 1901 Findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(2) that Congress, through statutes, treaties, and the general course of dealing with the Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resources that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from

them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

Also involved in this Petition is definition of Jurisdictional Section 1911:

Child Custody Proceedings

§ 1911 Jurisdiction, intervention; full faith and credit

(a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal Law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the

Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) In any State Court proceeding for the foster care placement of, or termination of parental rights to, any Indian Child, the Indian custodian of the child and the Indian child's tribe shall have the right to intervene at any point in the proceeding.

(d) The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

Under definition of Section 1903, we find the following:

(3) "Indian" means any person who is a member of an Indian tribe.

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

STATEMENT OF FACTS

Esther Antonio, a full blooded Navajo Indian, Appendix, 18a, with a census number in the Navajo tribe, Appendix 19a, filed an action in the State Court of Bernalillo County, New Mexico, to establish paternity and for support for her daughter, Rachel Antonio, who was a Navajo child and had been enrolled in the Navajo nation by her mother, Appendix 22a. Plaintiff admitted that the child Rachel Antonio, was a member of the Navajo tribe of Indians, Appendix 24a.

The Defendant was a Caucasian resident and citizen of New Mexico and had never resided on any Indian reservation.

Suit was filed on April 4, 1979 and an amended complaint was filed on or about August 30, 1979, Appendix 27a. The child, Rachel Antonio, was born May 11, 1975 at Presbyterian Hospital, Albuquerque, New Mexico. A birth certificate from the State of New Mexico, Appendix 49a, on information supplied by the mother, stated that the mother of the child is a Navajo Indian. The name of the father is left blank. The child was always identified with the last name of the mother, Appendix 49a.

According to the mother's attending physician, the child was full term when born on May 11, 1965, Ap-

pendix 36a. The Navajo mother had ancestorial ties as a Navajo and had never rejected her membership in the tribe, Appendix 19a. No written or oral evidence, acknowledging paternity by the Defendant exists, Appendix 27a. Paternity in the Defendant is an issue re time of conception, since half of the period when Plaintiff's doctor said that conception would have occurred was in August 1974 and half in September, 1974. The Plaintiff said she had not been in contact with the Defendant during August since she was on the reservation. Appendix 26a. The case at the present time is at issue awaiting trial in the State Court of New Mexico. The defendant denied paternity.

The mother was registered to vote on the Reservation and not in the State of New Mexico, Appendix 26a.

Her deposition shows her own avowals on Indian membership. Her present allegiance to Navajo customs appears throughout her deposition, Appendix 23a. Her Navajo family relationships are paramount, Appendix 22a.

Defendant filed a motion to dismiss for lack of jurisdiction on the parties and the subject matter, Appendix 28a. Defendant also filed an answer with affirmative defenses of lack of jurisdiction, Appendix 29a. The trial court judge denied the motion, claiming in his decision in open court that:

> "I don't think that the State of New Mexico has delegated to the federal government exclusive jurisdiction over matters involved in this Court in a paternity suit in the State of New Mexico. The exercising sovereignty this state has retained

> and the fact this particular plaintiff has chosen to submit herself to the jurisdiction of this Court, I think is a valid exercise and proper, and your motion to dismiss for lack of jurisdiction is denied."

There are four factual premises which channel the aspect to a simplified issue, which issue is: Is there jurisdiction in the State of New Mexico Courts to determine paternity of a Navajo Indian child, with a full blooded Navajo mother when paternity is denied by a Caucasian resident of New Mexico.

The premises are one: that the statute of the both mother and daughter as being always and everywhere full members of the Navajo tribe is claimed and admitted by all parties, Appendix 33a.

Second it is admitted that the Defendant, the alleged father, is a State of New Mexico resident and never at anytime a member of the Navajo nation.

Third, it is a fact that the Navajo child was conceived when the mother was living at the Reservation, but that relations could have occurred off the reservation, but Defendant denies paternity in any event.

Fourth, the Indian mother Plaintiff's claim for jurisdiction in the State Court are based on the residence of the Indian mother being off the reservation when the suit was filed some four years after the birth of the Navajo child and because the Defendant was a New Mexico resident and perhaps because the Indian child was born off the reservation and at a hospital in Albuquerque, New Mexico, Appendix 49a, and that the Defendant should not be able to escape his obligations under State law.

Plaintiff in her pleadings below admits full tribal membership of both mother and daughter, Appendix 34a, however Plaintiff claims Jurisdiction in the State Court because the Defendant "is not an Indian" and "the cause of action arose outside the exterior boundaries of the reservation", Appendix 27a.

This latter contention must be based on the place of birth which was outside the reservation. The real party to the lawsuit is the Indian child, Rachel Antonio and Defendant has contended that the accident of birth outside the reservation is not an exception of Navajo law contained in the Navajo Tribal Court which provided jurisdiction in the Navajo Tribal Court for paternity actions, T. 7, § 133 of the Navajo Tribal Code, 1969 Ed.

Department of Interior's resolution also requires Navajo Court jurisdiction for a paternity action. Plaintiff admits that there is no issue about the court's "automatic tribal membership" or that the mother is a "full blooded Navajo Indian", Appendix 34a, 25 C.F.R. 11.30.

Petition in Prohibition was denied by the Supreme Court of New Mexico. During discovery procedures Defendant raised the Fifth Amendment to the United States Constitution against self-incrimination based upon possible criminal charges arising from non-support if paternity would be established. Protection against self-incrimination was also a subject of the original proceeding in Prohibition to the Supreme Court of New Mexico since the right to raise the Fifth Amendment was denied in the Lower Court, Appendix 39a. Prohibition was denied regarding the application of the Fifth Amendment to the proceed-

ings. No opinion was issued by the Supreme Court in denying the Defendant's petition for Writ of Prohibition, Appendix 1a. The lower court in denying the Fifth Amendment's use by the Defendant, asserted that the Fifth Amendment is not applicable in a civil action and that the paternity case was a civil action, Appendix 39a.

When applying for employment, the Navajo mother said that she had lived on the Navajo reservation off and on for thirty six years, Appendix 32a.

She was living on the reservation at the ancestorial home at the time when conception would have occurred according to the Navajo mother's doctor, Appendix 35a. She moved off the reservation approximately three months after conception, Appendix 32a, and was residing in Albuquerque when Rachel Antonio was born on May 11, 1975, which was four years before the paternity action was filed. She named herself as the only Plaintiff, and did not make her daughter a party as such.

Defendant filed an original Prohibition action in the Supreme Court of New Mexico asserting lack of jurisdiction in the State Court of New Mexico. The Prohibition action claimed that a Navajo child's paternity must be decided by the Tribal Court, by a law of the Navajo Code and also by virtue of a Resolution of the Department of the Interior that jurisdiction exists in the Tribal Court. The Supreme Court denied the Writ, Appendix 1a.

REASONS WHY THE APPEAL SHOULD BE GRANTED

State Jurisdiction Would Violate the Treaty of 1868 and the Rights of Congress

The basic document is the treaty with the Indians, including the one in question with the Navajos in 1868. There were promises and considerations furnished by the Navajos in return for the obligations assumed by the United States. The Indian Child Welfare Act, 25 U.S.C. § 1901, et seq., expresses a national interest in Indian children and finds expression in this language: "There is no resource that is more vital to the existence and integrity to Indian tribes than their children. Rachel Antonio is a Indian child and although a paternity action as such is not the direct subject matter of the Indian Child Welfare Act, nevertheless she is of the class towards whom the congressional "Declaration of Policy" § 1902, supra, is directed. In the judicial field, this Court has been equally interested and sensitive to the Indian child and its protection as a member or potential member of an Indian tribe. Legal efforts of the present time build on legal and judicial labor of the past and need not be concerned with any debate as to the attitude of the Federal Judiciary. Present efforts can be directed towards eliminating an individual case situation that tends to undermine tribal integrity.

In recent years decisions from this court have recognized the necessity of restraint upon state authorities in commercial matters, *William* v. *Lee,* 358 U.S. 217, 3 L.Ed. 2d 261, 79 S.Ct. 269. The State of New Mexico by its Enabling Act (36 Statutes at Lage 557, Chapter 310), rejected Indian jurisdiction.

Within the field of domestic relations, the New Mexico Supreme Court in 1972 spoke in *Natewa* v.

Natewa, 84 N.M. 69, 499 P.2d 691 and cited the Department of Interior's resolution that the Court of Indian Offenses shall have jurisdiction of all suits brought to determine the Paternity of the child and to determine the support of a child. The Department of Interior Resolution 25 C.F.R. 11.30, quoted with approval therein reads: "The Court of Indian Offense shall have jurisdiction of *all* suits brought to determine paternity of a child and to obtain a judgment for the support of the child." Italic supplied.

This Federal Rule, supra, clearly indicates the exercise of the Federal Government's preemptive right in Indian matters arising from a Treaty of the U.S. In this case, the Treaty of 1868, Appendix 2a, with the Navajo Nation.

The Department of Interior Resolution, § 11.30, supra, continues with equality strong language about the exclusiveness of Indian jurisdiction on paternity and support matters, and at the same time prohibiting any thought of concurrent jurisdiction, where it says, "A judgment of the court establishing the identity of the father of the child shall be conclusive of that fact in all subsequent determinations of inheritance by the Department of the Interior or by the Court of Indian Offenses."

The instant case by being allowed jurisdiction in the State Court of New Mexico violates the "two barriers" laid down in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 65 L.Ed. 2nd 665, 100 S.Ct. 2578 (1980). There is a preemption by Federal Law as expressed in the Department of Interior's regulation, 25 C.F.R. 11.30, *and* also an infringement "on the rights of reservation Indians to make their own

laws and to be ruled by them." If commercial transactions and tax questions as in Williams v. Lee, supra, and White Mountain Apache Tribe v. Bracker, supra, can be the subject of federal government protection for the Indians against the taxing authority of the State or the right to sue by a State citizen, then the right of the Indian tribe and tribal government to determine such domestic affairs as Paternity for its members, would call for even greater protection and restraint on the State courts from usurpation by the State judiciary. The Indian Child Welfare Act, supra, could have an application to a Paternity action under the New Mexico Statute Section, Appendix 44a. Esther Antonio's Complaint in Bernalillo County, New Mexico is filed under the New Mexico Statute on Paternity and permits extensive control over the child even beyond the Paternity determination, Appendix 46a. § 40-6-1 Appendix 47a, says: Jurisdiction if acquired on the basis of determining Paternity, does, per se, establish jurisdiction for custody determination. Therefore, submitting to a trial in the New Mexico court under its Paternity statute, is to place the Indian child in the direct court jurisdiction of this particular state court for the entire period of its minority. It also places the Indian mother under the direct control of the court and she could be deprived of custody by the provisions of the New Mexico statutes. App. 46a. Obviously, this is a usurpation of the tribal right to govern its own members, and could affect termination of membership in the tribe. *Santa Clara Pueblo* v. *Martinez* dealt with significant problems of tribe membership and pointed out that non-tribal courts and agencies should not be permitted to affect membership in the tribe or pueblo even though, judged by American standards of equality and due process, the actions

of the tribe or pueblo seem unconstitutional. *Santa Clara* v. *Martinez,* 436 U.S. 49, 56 L. Ed. 2d 106, 98 S.Ct. 1670.

In the case of Fisher v. District Court, Sixteenth Judicial District, In the Matter of the Adoption of Ivan Firecrow, supra, closely resembles the instant case. An Indian child was the direct object of the legal proceeding. It was contended that the congressional policy of furthering Indian self government constituted an impermissible racial discrimination and that to deny Jurisdiction in the Montana court would deny equal protection to Indian Plaintiffs. A similar contention could be raised herein. This court in Fisher, supra, pointed out that state court jurisdiction had been denied even in litigation between Indians and non-Indians in Williams v. Lee, supra, and since the litigation in the Montana Court involved only Indians, at least the same standard must be met before the State Court could exercise jurisdiction. In language that could be applied directly to our case, the PER CURIAM opinion states:

> "The exclusive jurisdiction of the Tribal Court does not derive from the race of the Plaintiff but rather from the quasi-sovereign status of the Northern Cheyene Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self government. *Morton* v. *Mancari,* 417 U.S. 535, 551-555, 94 St. Ct. 2474, 2483-2485, 41 L. Ed. 2d (1974)."

The Indian Child Welfare Act envisions the many and varied problems of inheritance resulting from family changes affecting Indian children. Many unsatisfactory results would follow by allowing the State Courts to proceed in a Paternity action by a Navajo mother for her Navajo child. In *U.S.* v. *Quiser*, 241 U.S. 602, 36 S. Ct. 699, 700 (1916), Justice Van Deventer declared the Opinion of the court in these words:

> "At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses against another to be dealt with, according to their Tribal customs and laws."

It is the child, Rachel Antonio, whose status is going to be affected and potentially could be affected again and again in the New Mexico Paternity proceeding, including her status with her tribe. The decisions of this Court clearly state that her tribal court should decide her status and all the matters that flow from that like inheritance, etc., *Santa Clara Pueblo* v. *Martinez,* supra.

The fact that Esther Antonio, the Indian mother herself invoked the State Court does not change the fact that the "child" Rachel is the real person involved. Jurisdiction cannot be conferred by consent, *Nelson* v. *Dubois,* 232 N.D. 54, (N.D.) 1975. Reference to *Fisher* v. *District Ct. of Montana,* supra, shows that case captioned as "In re: Ivan Firecrow, et al., in the Montana Court, Ivan Firecrow being the Indian child involved. The caption indicates the true nature of the proceedings herein even though this case was styled Esther Antonio vs. the alleged father. The "Indian child" Rachel, has been forced into State Court.

"Inheritance" is sequential to Paternity". In deciding one, the other may be decided. The mother Esther Antonio is in a Navajo family which has possession of reservation land, Appendix 21a. The child Rachel is in that family at least now. Can the child be forced into a State Court for a state decree which could affect her tribal rights? *Jones* v. *Meehan,* 175 U.S. 1, 44 L.Ed. 49, 20 S.Ct. 1 and other cases alleged therein decide that land of the Shawnee Tribe descended according to the law of the Indian woman's tribe and not according to the law of Kansas. The Jones vs. Meehan ruling went further and held that rights, under a lease of land granted by the United States to an Indian, "could not be devested by any subsequent action of the lessor, or of Congress, or of the Executive Department." It is true that Indian land is not the subject matter of Esther Antonio's lawsuit in the State Court of New Mexico, but it could affect reservation land. It could be involved in this State Court Paternity claim since the State Court has continuing jurisdiction over both the "child Rachel" and "the Mother Antonio" under the Statute, App. 46a.

The reality of Pueblo Indian sanctions against their own members, who do not adhere to the rules of the Pueblo, is stated in the facts of Santa Clara Pueblo v. Martinez, supra. The Navajo Indian Tribal reaction to the Paternity suit in Bernalillo County, New Mexico State Court, which is in direct violation of the Tribal Resolution, supra, that jurisdiction is with the Navajo Courts, could have repercussions upon both Rachel and Esther despite the absence of intent by Rachel "the child". Certainly the State District Court of New Mexico would be powerless to alter the results of Tribal disapproval, Santa Clara Pueblo vs. Martinez,

supra. The State Court is indifferent to these consequences, and the expression that it "the State of New Mexico" was a source of "delegated power" to the Federal Government has a forbidding note about the realization of Indian sovereignty. Justice Miller in U.S. vs. Kagama, 18 U.S. 375, 30 L.Ed. 228, 6 S.Ct. 1109, in speaking of Indian communities said "They have no allegiance to the states and receive from them no protection. Because of the local ill feelings, the people of the states where they are found, are often their deadliest enemies. From their very weakness and helplessness, so largely due to the coure of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection and the power". We request the use of that protective "power" in this appeal.

As defined in the Indian Child Welfare Act, the status of a person as an Indian can be determined by "one parent". Therefore even by the Indian Child Welfare Act, Esther Antonio as parent could and did establish Rachel as an Indian by giving her a census number in the tribe. The white man's concept of illegitimacy and the social stigma is alien to Indian life. Appendix 19a. We submit that *everything* about the *only* two persons, who could figure into jurisdiction in a paternity case in State Court, is Indian.

When this is coupled with the two universal concepts of preventing any state action which tends to diminish tribal sovereignty over its members and the preemptive role of the Federal Government and Congress over the State and further established by the Disclaimer by New Mexico in its Enabling Act, we submit that jurisdiction does not exist. Although the Enabling Act of New Mexico refers to a denial of

jurisdiction by the State over Indian lands, it could apply to this case as an adjunct to the paternity action since property rights on the reservation could be a result of the paternity determination. *Chino* v. *Chino,* 90 N.M. 203, 561, P.2d 476 (1977).

We mention the public policy of the State as a possible ground for asserting jurisdiction in paternity actions.

This policy is not the welfare of the child, but that the taxpayers will be kept from supporting the child as a public charge. Even if this taxpayers savings is adequate in a paternity case, the proper entity to bring the actions is the State and the New Mexico statute expressly allows for this. Appendix 45a. The Journal of Family Law, University of Louisville School of Law, Vo. 19, Number Three (1980) is wholly devoted to the issues involved in paternity actions and critically points out the sad results that can and have occurred to the parties involved while trying to lower the number of children who are public charges to the taxpayer.

Because the New Mexico Courts Have Claimed a Constitutional Right Which Belongs to the U.S. Government, In Taking Jurisdiction the New Mexico Court Said:

> This court is not bound by any federal regulations in terms of a paternity suit.
>
> * * *
>
> I don't think that the State of New Mexico has delegated to the federal government exclusive jurisdiction over matters involved in this Court in a paternity suit in the State of New Mexico. In exercising the sovereignty this state has retained and the fact this particular plaintiff has chosen to submit herself to the jurisdiction of this Court, I think is a valid exercise and proper, and your motion to dismiss for lack of jurisdiction is denied.

The reasoning by Judge Stowers indicates a lack of comprehension of Indian Law. From the landmark decision of *Worcester* v. *Georgia*, 31 U.S. 515 (1832) to the present, a basic principle has been involved in all cases of Indian jurisdiction: the states only have such jurisdiction over Indians as Congress permits them to exercise. This principle was recently recognized by the New Mexico Supreme Court in the *Chino* case, supra, at 206, when it was held that "the state may not assume jurisdiction without congressional or tribal authorization." The "policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history. *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172, 36 L.Ed.2d 129, 93 S.Ct. 1257, 1262 (1973).

Judge Stowers' analysis is incorrect when he finds there is jurisdiction because the State of New Mexico has not delegated exclusive jurisdiction to the federal government. His analysis is backwards: the issue is what jurisdiction the federal government allows the states to exercise over Indians, *not* what the state allows the federal government to exercise. *Chino*, supra, at 206. The Navajo Tribe was once a sovereign nation; its relations with the State of New Mexico are governed by applicable treaties. *McClanahan* v. *Arizona State Tax Commission*, supra at 168.

Judge Stowers' analysis is also incorrect in finding that there is jurisdiction because "this particular plaintiff has chosen to submit herself to the jurisdiction of this Court." As *Nelson* v. *Dubois*, supra, indicates a state court does not have jurisdiction even if a particular Indian party consents to its jurisdiction. The state court lacks subject matter jurisdiction, as well as personal jurisdiction. Subject matter jurisdiction cannot be waived by the parties.

The State Court's constitutional inaccuracy signifies a failure to recognize the sovereignty and existence of the Indian tribe and its power to govern its members. It also fails to recognize the Federal Government's authority over Indian affairs and the rejection by the State of New Mexico in its Enabling Act.

This State Court's attitude is directly counter to the Treaty of 1868 between the United States and the Navajo Nation and Tribe of Indians. App. 31a.

Jurisdiction Cannot Depend on the Defendant, The Alleged Father, Who Denies It

Whether the Defendant who denies Paternity belongs in Court at all is to be determined only at the conclusion. If jurisdiction is based on the Defendant, then this is a unique legal situation as a defense verdict establishes that the case never belonged in the court in the first place.

The lack of certainty that a Plaintiff's verdict as a Paternity is a biological fact compounds the problem. See Journal of Family Law, University of Louisville, School of Law, Vol. 19, Number Three, 1980-81.

Paternity actions are somewhat unique in that the result may be to name "a" father but not "the" father. At page 493, in Journal of Family Law, we find the following: "In two studies well over a third of the disputed cases and eighteen of the undisputed cases were initiated against Defendants who were not "the fathers". We submit that jurisdiction should not depend on the father, and this case, jurisdiction should now depend on the father being a citizen of the State.

The Navajo Tribal Code of Law Expressly Mandates Jurisdiction for Its Own Courts

The following provision of the Navajo Tribal code is involved: "By Resolution CJA-1-5, the Navajo Tribal Council adopted as Tribal Law the regulation of the Department of the Interior contained in 25 C.F.R. § 11.30 which states: The Court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child."

The following Regulation is involved in the appeal. 25 C.F.R. § 11.22 states:

> "The Court of Indian Offenses shall have jurisdiction of all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and all other suits between members and non-members by stipulation of both parties . . .".

It refers to jurisdiction over a "defendant" who is a member of the tribe, but the person who is the most affected by the case in State Court is the Indian Child, Rachel Antonio, who is made the direct object of the mother's action without her consent. This outweighs the fact that the alleged father is the named defendant.

Determination of Blood Relationship Is the Most Fundamental Right of the Indian Tribe

To allow another governmental entity, in this case, the State of New Mexico, to invade this most sacred aspect of the Indian Nation is to strike at the existence of the tribe. It is an *Indian* child admittedly. App. 34a.

The entire objective of the Indian Child Welfare Act pages is to prevent the assimilation of Indian

children into the non-Indian families. Having jurisdiction retained in Tribal Court is the way this is mandated. The exercise of state power upon Indian children goes directly counter to the congressional policy. Holding out the prospect of money "support" is not a ground to avoid Tribal authority.

The Court Denied the Use of the Fifth Amendment in This Paternity Suit

As an additional point, State Trial Judge Stowers ruled that the Fifth Amendment to the United States Constitution did not apply to the Paternity action because it was a civil case. This could be a by product of his statement on Indian jurisdiction that the State has not delegated any such power to the Federal government. However the application of the restraints of the Bill of Rights to the States by the 14th Amendment, (U.S. Const.) is established. The privilege against self-incrimination, Amendment V to the U.S. Constitution is included.

This matter arose in the deposition of the defendant, which would have vitality at the scheduled trial in February 1982 if jurisdiction exists. The court ordered answered a series of questions which had been reduced to written interrogatories and to which the Fifth Amendment had been raised, Appendix 40a.

It is certain that many of these questions directly affect the alleged sexual acts of the parties and similar matters, see Appendix 42a.

We submit that a defendant in a Paternity action has the protection against self-incrimination. An examination of the New Mexico Illegitimacy and Support Act, Appendix 43a, shows several criminal charge

possibilities, all stemming from the determination of Paternity with coercive and criminal powers provided for within the Act and by use of the result of a verdict against the Defendant.

The trial judge made distinction between the Fifth Amendment stating it does not apply to civil action. There is a serious question as to whether a Paternity action such as those authorized under New Mexico Statute, supra, is civil or criminal, see Journal of Family Law, Page 478, supra. In any event it has been determined that it does apply.

The case of State vs. Zamora, 84 N.M. 245, 501 P.2d 689, illustrates how firm the courts of this state are in resisting attempts by some type of distinction to undermine the protection afforded people not to incriminate themselves. That case says,

> "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might by dangerour because injurious disclosure could result. The trial judge in appraising the claim, 'must be governed as much by his personal perception of the peculiarities of the case as by the facts in evidence.' See Taft, J., in Ex parte Irvine, 74 F. 954, 960 (C.C.S.D. Ohio, 1896)."

Later on the Court says,

> "When a witness is asked a question the answer to which could show that he had already committed a crime (perjury at a prior trial or hearing) his refusal to answer is permissible almost by the definition of self-incrimination. However, he is still criminally accountable for his perjury, but he may not be convited out of his own mouth over his

> claim of privilege. United States v. Wilcox, supra; United States v. Orta, 253 F.2d 312 (5th Cir. 1958); Glickstein vs. United States, 222, U.S. 139, 32 S.Ct. 71, 56 L.Ed. 128 (1911).

In view of the nature of this paternity suit, we submit that the above quote justifies refusal to answer "almost by the definition of self-incrimination."

In 52 Virginia Law Review, 322 (1966), there is an article entitled "Use of the Privilege Against Self Incrimination in Civil Litigation." The opening sentence is as follows:

> "Although by its very nature the privilege against self-incrimination applies primarily to a defendant in a criminal prosecution, it is also available to a witness or party in a civil proceeding when there is a possibility of subsequent criminal prosecution.[1] Citing (1924); Wilbanks v. Wilbanks, 220 Ga. 665, 141 S.E. 2d 161 (1965)."

There seems to be no reason nor any authority which would bar the use of the privilege against self-incrimination in this case. Even the distinction between the civil litigation and criminal prosecution would seem to favor holding this paternity action to be a criminal or quasi-criminal proceeding. Support for this position exists from the reading of Section 40-5-19, Appendix 46a, which indicates that the court has continuing jurisdiction "until the judgment of the court has been completely satisfied," and grants to the court coercive powers which include "imprisonment in the penitentiary for not exceeding two years," under Section 40-5-21, Appendix 46a. So in this instance the paternity suit, although instituted by a civilian, nevertheless gives to the court power to punish by imprisonment in the penitentiary for the failure to carry out a judgment that could be issued in this case.

New Mexico itself has ruled on the matter, that Fifth Amendment privileges apply in civil proceedings. A defendant in a civil lawsuit is privileged against answering questions where the answers might tend to incriminate him in future criminal proceedings. Rainbow Baking Co. v. Apodaca, 88 N.M. 501, 542 P.2d 1191 (C.A. 1975), cert. den. 89 N.M. 6. See also Abramowitz vs. Voletsky, et al., 262, N.Y. S.2d 991, (1965)., which is a civil case where the answers are not given in a deposition on the grounds of self-incrimination, the motions stating: "There is no claim by plaintiff that the answers to the questions propounded might not incriminate or tend to incriminate the defendant. It appearing that the claim of self-incrimination is justified, defendant's answer may not be stricken." Citing cases: McKelvey v. Freeport Housing Authority, 29 Misc. 2d, 140, 220, N.Y.S.2d 628; Barbato v. Tuosto, 38 Misc. 2d 823, 238 N.Y.S.2d 1000; see also Levine v. Bornstein, 13 Misc.2d 161, 174, N.Y.S.2d, affd. 7 A.D.2d 995, 183, N.Y.S.2d 868, affd. 6 N.Y.S.2d 892, 190 N.Y.S.2d 702, 160 N.E.2d 921. Also see, Kastigar v. U.S. (1972), 406 U.S. 441, 32 L.Ed. 2d 212, 92 S.Ct. 1653. Re Gault (1967), 387 U.S. 1, 18, L.Ed. 2d 527, 87 S.Ct. 1428. Lefkowitz v. Turley (1973), 414 U.S. 70, 38 L.Ed. 2d 274, 94 S.Ct. 319. Re Paternity: Kaneshiro v. Belisario, 51 Hawaii 649, 466 P.2d 452 (1970). (in paternity suit, it was a reversible error for plaintiff to comment on defendant's assertion of his right against self incrimination while on witness stand.

This Fifth Amendment privilege was included within the same Writ to the Supreme Court of New Mexico App. 47a & 48a as the matter of Indian Jurisdiction in a Paternity Suit. It was equally denied by the Order of Supreme Court. App. 1a.

The State Court's refusal to draw the privilege against self-incrimination as stated thusly, "I understand the position taken the Defendant in this case; however, I don't see this as a quasi criminal case at all. I see this basically as a civil action to establish Paternity. I don't think that the questions that are asked for purposes of establishing an acquaintanceship or relationship, intercourse, or matters of that kind are protected by the Fifth Amendment, App. 39a.

CONCLUSION

For the reason that jurisdiction by the State of New Mexico Courts over Paternity of a Navajo child is in violation of the Treaty of 1868 and is against its validity, 28 U.S.C. § 1257, and because the reason stated for state jurisdiction questions and denies the right of the United States and the Navajo Nation to make the Treaty as independent sovereigns, we request that the appeal be granted.

Since the question of the privilege against self-incrimination under the Fifth Amendment was included within the Writ of Prohibition it also is included in the appeal, Appellant asks that the appeal be granted. App. 47a, 48a.

Respectfully submitted,

EUGENE E. KLECAN
Attorney for Appellant

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520 Sandia Savings Building
Fourth and Gold, S.W.
Albuquerque, New Mexico 87102
(505) 243-7731

APPENDIX

Exhibit "A"

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Wednesday, August 19, 1981

No. 13,813

STATE OF NEW MEXICO, ex rel RICHARD ROCK, *Petitioner,*

vs.

HON. HARRY E. STOWERS, JR., District Judge, *Respondent.*

Original Prohibition Proceeding

This matter coming on for consideration by the Court upon petition for alternative writ of prohibition, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that petition for writ of prohibition be and the same is hereby denied.

ATTEST: A TRUE COPY

/s/ ROSE MARIE ALDERITE
Clerk of the Supreme Court
of the State of New Mexico

Exhibit "O"

TREATY WITH THE NAVAJO INDIANS
June 1, 1868

Treaty between the United States of America and the Navajo Tribe of Indians; Concluded June 1, 1868; *Ratification advised July* 25, 1868; *Proclaimed* August 12, 1868.

ANDREW JOHNSON,

PRESIDENT OF THE UNITED STATES OF AMERICA,
TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME,
GREETING:

WHEREAS a treaty was made and concluded at Fort Sumner, in the Territory of New Mexico, on the first day of June, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Lieutenant-General W. T. Sherman and Samuel F. Tappan, commissioners, on the part of the United States, and Barboncito, Armijo, and other chiefs and headmen of the Navajo tribe of Indians, on the part of said Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit: —

Articles of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W. T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo nation or tribe of Indians, represented by their chiefs and headmen, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and headmen being hereto subscribed,) of the other part, witness: —

ARTICLE I. From this day forward all war between the parties to this agreement shall forever cease. The govern-

ment of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner

* * * * * * * * * *

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each.

The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendents as may be thought proper.

ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

ARTICLE VII. When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars.

ARTICLE VIII. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named, on the first day of September of each year for ten years, the following articles, to wit:

Such articles of clothing, goods, or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian—each Indian being

encouraged to manufacture their own clothing, blankets, &c.; to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing, under the article, can be appropriated to better uses for the Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes, but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

Article IX. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to

justify the chase; and they, the said Indians, further expressly agree:

1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built across the continent.

2nd. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.

3rd. That they will not attack any persons at home or travelling, nor molest or disturb any wagon trains, coaches, mules or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. That they will never capture or carry off from the settlements women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or headman of the tribe.

7th. They will make no opposition to the military posts or trade now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE X. No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least

three fourths of all the adult male Indians involved or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article —— of this treaty.

ARTICLE XI. The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

ARTICLE XII. It is further agreed by and between the parties to the agreement that the sum of one hundred and fifty thousand dollars appropriated or to be appropriated shall be disbursed as follows, subject to any conditions provided in the law, to wit:

1st. The actual cost of the removal of the tribe from the Basque Rodondo reservation to the reservation, say fifty thousand dollars.

2nd. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.

3rd. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.

4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them may determine.

5th. The removal of this tribe to be made under the supervision of and direction of the military commander of

the Territory of New Mexico, and when completed, the management of the tribe to revert to the proper agent.

ARTICLE XIII. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart from the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart from the exclusive use and occupation of the Indians.

In testimony of all which the said parties have hereunto, on this the first day of June, one thousand eight hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

W. T. SHERMAN,
Lt. Gen'l, Indian Peace Commissioner.

S. F. TAPPAN,
Indian Peace Commissioner.

BARBONCITO, Chief.	his x mark.
ARMIJO.	his x mark.
DELGADO.	
MANUELITO.	his x mark.
LARGO.	his x mark.

HERRERO.	his x mark.
CHIQUETO.	his x mark.
MUERTO DE HOMBRE.	his x mark.
HOMBRO.	his x mark.
NARBONO.	his x mark.
NARBONO SEGUNDO.	his x mark.
GANADO MUCHO.	his x mark.

Council.

RIQUO.	his x mark.
JUAN MARTIN.	his x mark.
SERGINTO.	his x mark.
GRANDE.	his x mark.
INOETENITO.	his x mark.
MUCHACHOS MUCHO.	his x mark.
CHIQUETO SEGUNDO.	his x mark.
CABELLO AMARILLO.	his x mark.
FRANCISCO.	his x mark.
TORIVIO.	his x mark.
DESDENDADO.	his x mark.
JUAN.	his x mark.
GUERO.	his x mark.
GUGADORE.	his x mark.
CABASON.	his x mark.
BARBON SEGUNDO.	his x mark.
CABARES COLORADOS.	his x mark.

Attest:

GEO. W. G. GETTY,
Col. 37th Inf'y, Bt. Maj. Gen'l U. S. A.

B. S. ROBERTS,
Bt. Brg. Gen'l U. S. A., Lt. Col. 3d Cav'y.

J. COOPER MCKEE,
Bt. Lt. Col. Surgeon U. S. A.

THEO. H. DODD,
U. S. Indian Ag't for Navajos.

CHAS. MCCLURE,
Bt. Maj. and C. S. U. S. A.

JAMES F. WEEDS,
Bt. Maj. and Asst. Surg. U. S. A.

J. C. SUTHERLAND,
Interpreter.

WILLIAM VAUX,
Chaplain U. S. A.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-fifth day of July, one thousand eight hundred and sixty-eight, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:—

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
July 25, 1968.

***Resolved,* (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the treaty between the United States and the Navajo Indians, concluded at Fort Sumner, New Mexico, on the first day of June, 1868.**

Attest:

GEO. C. GORHAM,
Secretary,
By W. J. McDONALD,
Chief Clerk.

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-fifth of July, one thousand eight hundred and sixty-eight, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the City of Washington, this twelfth day of August, in the year of our Lord one thousand [SEAL.] eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-third.

ANDREW JOHNSON.

By the President:

W. HUNTER,

Acting Secretary of State.

Exhibit "P"

LEGISLATIVE HISTORY
P.L. 95-608

The Supreme Court has, time and again, upheld the sweeping power of Congress over Indian matters. The cases are far too numerous to cite, but two cases will serve to exemplify this position. In *U.S.* v. *Kagama*, 118 U.S. 375 (1886)[3] the Court said:

> These Indian tribes are wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

And in *United States* v. *Nice*, 241 U.S. 591 (1916),[10] the Court held:

> The power of Congress to regulate or prohibit traffic with tribal Indians within a State whether upon or off

1. 6 L.Ed. 23.
2. 65 S.Ct. 1373, 89 L.Ed. 1782.
3. 88 S.Ct. 362, 19 L.Ed.2d 438.
4. 88 S.Ct. 2096, 20 L.Ed.2d 1166.
5. 91 S.Ct. 1704, 29 L.Ed.2d 233.
6. 23 L.Ed. 833.
7. 67 S.Ct. 810, 91 L.Ed. 967.
8. 8 L.Ed. 483.
9. 6 St.Ct. 1109, 30 L.Ed. 228.

> an Indian reservation is well settled * * *. Its source is twofold; first, the clause of the Constitution expressly investing Congress with authority "to regulate Commerce * * * with the Indian tribes", and, second, the dependent relation of such tribes to the United States.

It cannot be questioned that Congress has broad, unique powers with respect to Indian tribes and affairs. There is only one caveat: While those powers may be plenary, the exercise may not be arbitrary. For example, Congress may not take Indian property without just compensation nor may it establish a religion for Indian tribes.

Plenary power and child welfare

The question then is: "Is the regulation of child custody proceedings and the imposition of minimum Federal standards an appropriate exercise of Congress plenary power over Indian affairs?"

We need only cite three cases to lay the foundation for the power of Congress to legislate in this area. In *U.S.* v. *Holliday*, 70 U.S. 407 (1866),[11] the Court said:

> Commerce with foreign Nations, **without doubt**, means commerce between citizens of the United States and citizens or subjects of foreign governments as individuals. And so commerce with Indian tribes means commerce with the individuals composing those tribes.

Exhibit "X"

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

No. DR 79-01505

ESTHER ANTONIO, *Plaintiff*,

vs.

RICHARD ROCK, *Defendant*.

MOTION TO COMPEL DISCOVERY

COMES Now the Plaintiff, Esther Antonio, by her attorney, Leo C. Kelly, and moves the Court for an Order directing the Defendant, Richard Rock to answer questions propounded to him in the taking of his deposition on February 2, 1981, at which time Richard Rock, by his attorney, Eugene Klecan, objected to a number of questions on various grounds. The following questions and answers thereto are the questions on which the Plaintiff moves the Court to Order answers:

Q. Are you acquainted, Dr. Rock, with a lady named Esther Antonio?

MR. KLECAN: I object and instruct you not to answer. We raise the Fifth Amendment.

THE WITNESS: I respectfully raise the Fifth Amendment to that question.

Q. Have you ever met a woman named Esther Antonio?

MR. KLECAN: We again instruct the Fifth Amendment is being applied.

THE WITNESS: I respectfully raise the Fifth Amendment.

Q. Have you ever met or are you acquainted with a child named Rachel Antonio?

MR. KLECAN: We raise the Fifth.

Q. Do you have knowledge of any person who had sexual intercourse with Esther Antonio during the months of July, August, and September of 1974?

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Monday, August 31, 1981

No. 13,813

STATE OF NEW MEXICO, ex rel RICHARD ROCK, *Petitioner,*

vs.

HONORABLE HARRY E. STOWERS, JR.
District Judge, *Respondent.*

NOTICE OF APPEAL

COMES Now the Defendant, Richard Rock, and hereby appeals to the United States Supreme Court from the final Order of the Supreme Court of the State of New Mexico, entered August 19, 1981, denying Defendant's Petition for Writ of Prohibition in an original prohibition proceeding in the Supreme Court of New Mexico. Appeal to this Court is taken pursuant to 28 U.S.C. § 1257.

KLECAN & ROACH, P.A.
/s/ JANET SANTILLANES
Janet Santillanes
Attorney for Petitioner
520 Sandia Savings Bldg.
Albuquerque, NM 87102
(505) 243-7731

Appendix

Transcribed statement of State Trial Court Judge Stowers related to jurisdiction and Indian Paternity cases: In deciding that the State District Court has jurisdiction, Judge Stowers stated:

> "This Court is not bound by any federal regulation in terms of a paternity suit."
>
> • • • •
>
> "I don't think that the State of New Mexico delegated to the federal government exclusive jurisdiction over matters involved in this Court in a paternity suit in the State of New Mexico. In exercising the sovereignty this state has retained and the fact this particular plaintiff has chosen to submit herself to the jurisdiction of this Court, I think is a valid exercise and proper, and your motion to dismiss for lack of jurisdiction is denied.

In referring to Tribal Laws, Judge Stowers said:

> "How would that court have any jurisdiction over Doctor Rock?"

Esther Ruth Antonio

was called as a witness by the Defendant, and having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. KLECAN:

Q. Would you state your name.
A. Esther Ruth Antonio.

Q. And you know your date of birth?
A. April 3, 1938.

Q. Where?
A. Rehoboth, New Mexico.

Q. Is that on the Navajo Reservation?
A. Yes.

Q. Where you born in the hospital?
A. At the Mission Rehoboth Hospital.
A. My father is dead.

Q. When did he die?
A. Two years ago.

Q. Where?
A. On the reservation.

Q. Do you know his census number, offhand?
A. No.

Q. Was he a Navajo Indian?
A. He's a full-blooded Navajo.

Q. Is your mother a full-blooded Navajo?
A. Yes.

Q. Where they married in any kind of ceremony?
A. Indian ceremonial.

Q. Indian ceremonial?

A. It's not recognized—I think it's common law in the white man's law.

Q. Are you telling me that you think that the white man's legal name for it would be a common law marriage?
A. Yes, that's what they call it.

Q. Were you given a census number?
A. Yes, but I don't know.

Q. And your mother is still alive?
A. My mother is still alive.

Q. Is she married to anybody now?
A. No.

Q. She's not living with any man?
A. No.

Q. Do you know when she and Largo split the blanket?
A. About two years after.

Q. Then there was an intervening marriage in there?
A. I don't know that one. There's a middle one. I don't know about that. That's the last one.

Q. If you live together, that's marriage, Navajo style?
A. That's marriage.

Q. What name do they give whereby they might be living in the hogan? Is that where you live, in a hogan?
A. We have a hogan for my mother. We have a house.

Q. You have a house, too?
A. Yes.

Q. Where is the house?
A. Right next to the hogan?

Q. And where is that located?
A. Coolidge, New Mexico.

Q. Is this your family home, so to speak?
A. Yes.

Q. Coolidge, New Mexico? And who lives there now?
A. My mother, the whole family.

Q. Is that in Arizona or New Mexico?
A. New Mexico.

Q. Where is that located in relationship to Crownpoint?
A. It covers the Crownpoint area and all the way down to Zuni, I think.

Q. It's the Eastern part of the reservation?
A. Yes.

Q. Crownpoint is right on there?
A. Yes, that's where the subagency is.

Q. Now, your whole family lives there? That's near Crownpoint, I understand?
A. Yes.

Q. But it is on the reservation?
A. Yes.

Q. Let me go back over this again, what you call something similar to divorce. When that takes place, the father leaves?
A. Yes.

Q. And then the children are not supported by him?
A. No, the mother does.

Q. The mother has the duty to take care of the children?
A. Well, she has all the wealth from the previous marriage. She has the horses, the cows, whatever, included.

Q. Regardless of whether she divorces, takes up with another man or whether he's the one that takes up with another woman?
A. Yes.

Q. It doesn't make any difference, the mother gets all the property in the divorce?
A. Yes.

Q. And the father, according to Navajo custom, doesn't have any responsibility to furnish anything for the children?

A. No.

Q. That's the way is happened in your case?

A. Yes.

Q. How many sisters do you have, full sisters?

A. Two.

Q. Now, I think you told us that in June of '74 you quit at Crownpoint and you were living up there. Did you let your house go right away up there, or did you continue to hold it for awhile in '74?

A. You had to move out of the government houses when you quit a government job.

Q. I am asking how quick.

A. As soon as you quit.

Q. You did get out that day, or thereabouts. Where did you go then?

A. To my mother's spare home.

Q. Was that in Coolidge?

A. Yes.

Q. Is this the hogan or the house?

A. It's the extra home they have at a hogan.

Q. In an affidavit that you filed in this case, in Paragraph 5, you said that during the month of September you had sexual relations with Richard Rock at the Travelodge Motel on Central Avenue near Interstate Highway 25. My question is, was this after you came back from your mother's house?

A. Yes.

Q. All right. And you say yes. Do you recall, were you registered at the Travelodge Motel at this time?

A. Yes.

Referring to family Indian life on the Navajo Reservation, she said:

Q. I am talking about the birth certificate. Have you ever seen it.

A. No, not on the birth certificate, this is on the Indian census.

Q. Where is that located?

A. Crownpoint.

Q. So you did register her in Crownpoint and got a census number?

A. Yes.

Q. What is her census number?

A. I don't have it. I couldn't tell you.

Q. But she does have one.

A. She does have one, but I couldn't tell you.

Q. What is your census number.

A. I couldn't tell you, either.

Q. And who was living, then in the home? You and Dolores?

A. Me and Dolores and Grandpa, when he was still living.

Q. And Grandpa was still living at that time, and that is your mother's father.

A. My mother's son by clan. It has to do with—it's really —forget it.

Q. No, we would like to know.

A. It's a clan situation where it's a son to her.

Q. A son to who?

A. To my mother.

Q. How does that come about?

A. It's a long story, you couldn't possibly cover in this thing. If you want to know, just go to, you know, some

anthropologist, they will tell you what clans are, and why they are really cared for, older people. White people wouldn't care, they would just throw them out or put them in a nursing home and forget about it, or to a mental health hospital, but we care for our own elderly people.

Q. How old was he?
A. Eighty-two.

Q. My question was, that seemed to provike this, I understood this to be your mother's father.
A. No, my mother's son.

Q. Your mother's son.
A. It's a clan deal that has been for years here. I don't know, I don't understand, but it's honored.

Q. What relationship, if any, was he to your mother?
A. A son.

Q. By adoption?
A. No, by clan. It's ancient history. If you want to know you can go find out. The anthropologists will tell you about it.

Q. Anyway, he was living there at this house. Who else?
A. Just me and Grandpa and Dolores.

Q. By your grandpa, you are referring to this man who is your mother's son.
A. Yes.

Q. For which we are going to have to get an anthropological explanation. O.K. Who was supporting you, then?
A. Nobody.
A. No.

Q. No?
A. No.

Q. You weren't receiving any kind of benefits from the tribe, or anything?
A. No.

Q. Who was supporting you with food and stuff?
A. I did weaving.

Q. You worked, then?
A. I guess you can call it work.

Q. You did weaving and you got money, food, what, for weaving?
A. Money and food.

Q. From whom?
A. From my weaving.

Q. Was that Navajo——
A. Navajo rugs.

Q. Navajo rugs. O.K. Is that a concern that has a place in Albuquerque or Gallup?
A. Gallup.

Q. Is that the Navajo Rug Company? What is the name of it?
A. My own, that I just sold it to the trading post.

Q. It is your own; is that what you are saying?
A. Every Navajo knows how to weave a rug.

Q. You would weave rugs.
A. We inherited this from our own relatives, taught us when we were kids.

Q. Are we talking about Navajo rugs?
A. Yes.

Q. So you became a weaver of Navajo rugs.
A. I had to do something to support myself.

Q. Does Rachel have a census number?
A. Yes.

Q. That's a Navajo census number?
A. Yes.

Q. Did you ever see Dr. Rock when you lived on the reservation, I mean on the reservation? Did you ever see him on the reservation when you lived on the reservation?

A. No.

Q. Did you ever see him in Phoenix when you lived over there?

A. No.

Q. Were you ever treated by Richard Rock for any ailment?

A. When I ran off the road he took x-rays of my ribs.

Q. When was this?

A. '76, I think. I don't remember, '76, it was after Rachel was born.

Q. Prior to the birth of Rachel you had never been a patient of his for any purpose at all?

A. If I got a cold, or something like that, he would give us samples, that's all.

Q. When you say "us", I assume you mean you and——

A. Dolores.

Q. ——Dolores. Had he ever examined Dolores after the first time. You said he referred her to Dr. Seelinger on neurological——

A. No.

Q. But he had given pills and samples.

A. Yes.

Q. What was the matter with your mother that she went to Dr. Rock?

A. Arthritis of the knee.

Q. Did you recommend Dr. Rock to her?

A. I talked to him about it, and he says bring her in.

Q. She has gone to him quite a few times, hasn't she?

A. Yes.

Q. But there came a time when you went to the motel for the first time to have sexual relations, didn't there?

A. Yes.

Q. When you decided to go to the motel and have sexual relations, who idea was it to go to the motel?

MR. KLECAN: I think she already answered that. I object.

A. My idea.

Q. Whose idea was it to go to the Travelodge Motel:

A. Mine.

Q. Your idea. O.K. Did Dr. Rock ever give you any money to pay for the motel room?

A. No.

Q. Are you registered to vote here?

A. No.

Q. Are you registered to vote anywhere?

A. On the reservation.

Q. At Window Rock, or Crownpoint?

A. Crownpoint.

Q. Would your records, like census number, and also Esther's be at Crownpoint?

A. Should be.

Q. Most of '74, then, you were living on the reservation, either at the BIA or at the hospital at Crownpoint Public Health Hospital or in your mother's house until September of '74.

A. Yes.

Exhibit "Y"

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

No. DR 79-01505

ESTHER ANTONIO, *Plaintiff*,

vs.

RICHARD ROCK, *Defendant*.

FIRST AMENDED COMPLAINT FOR PATERNITY

Plaintiff, ESTHER ANTONIO, for cause of action against Defendant, RICHARD ROCK, states:

1. That Plaintiff is a resident of the City of Albuquerque, Bernalillo County, State of New Mexico.

2. That Defendant is a resident of the City of Albuquerque, Bernalillo County, State of New Mexico.

3. Defendant, RICHARD ROCK, is the father of a certain child, namely, RACHAEL ANTONIO, born out of wedlock to the Plaintiff, ESTHER ANTONIO, on or about the 11th day of May, 1975, at Presbyterian Hospital, Albuquerque, New Mexico.

4. That by reason of §§ 40-5-1 et seq., N.M.S.A., 1978 Comp., Defendant, RICHARD ROCK, is obligated to contribute to the support of said child.

5. That the Defendant has acknowledged the paternity of the minor child at all times since her birth by contributing to the costs of the Plaintiff's pregnancy and confinement and by contributing to the costs of supporting the child since her birth.

6. That the contributions made by the Defendant toward the costs of supporting the child from May 11, 1975, until

the present do not comprise one-half of the total costs of supporting said child, as a result of which Plaintiff is entitled to judgment against the Defendant is an amount to be determined by the Court based upon the evidence to be presented.

7. That the Plaintiff is unable to afford her attorney fees and costs for the bringing of this action.

WHEREFORE, Plaintiff prays for judgment against the Defendant declaring that the Defendant is the father of the child born to the Plaintiff, for judgment in the amount of one-half (½) the expenses of supporting said child until she reaches the age of majority, for reasonable attorney fees, for her costs incurred herein, and for such other and further relief as to the Court seems proper.

MOTION TO DISMISS

COMES Now the Defendant Richard Rock, and, pursuant to Rule 12 of the New Mexico Rules of Civil Procedure, moves that this Court for its Order dismissing the plaintiff's First Amended Complaint with prejudice, and as grounds for this Motion states:

1. That the First Amended Complaint fails to state a claim upon which relief can be granted;

2. That the Court lacks jurisdiction over the parties;

3. That the Court lacks jurisdiction over the subject matter of this case.

WHEREFORE, the Defendant requests that the First Amended Complaint be dismissed with prejudice, and that judgment be entered in the defendant's favor.

Respectfully submitted,

ANSWER TO FIRST AMENDED COMPLAINT

COMES Now the defendant, Richard Rock, and answers the plaintiff's First Amended Complaint as follows:

1. That the defendant lacks knowledge sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 1 of the First Amended Complaint and therefore denies same.

2. The allegations in paragraph 2 of the First Amended Complaint are admitted.

3. The allegations contained in paragraph 3 of the First Amended Complaint are denied.

4. That the allegations contained in paragraph 4 of the First Amended Complaint are denied.

5. That the allegations contained in paragraph 5 of the First Amended Complaint are denied.

6. That the allegations contained in paragraph 6 of the First Amended Complaint are denied.

7. That defendant lacks sufficient knowledge to form a belief as to the truth or falsity of the allegations in paragraph 7 of the First Amended Complaint and therefore denies same.

AFFIRMATIVE DEFENSES

1. The Court lacks jurisdiction over the parties herein.

2. The Court lacks jurisdiction over the subject matter herein.

3. Plaintiff's action is barred by the statute of limitations.

4. The First Amended Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, defendant prays for judgment in his favor, for dismissal of this action, for his costs, and for such other relief as to the Court seems proper.

Respectfully submitted,

KLECAN & ROACH, P.A.

ORDER

THIS MATTER having come before the Court on the Defendant's Motion to Dismiss, the Court having heard the evidence and arguments of Counsel and being otherwise advised in the premises, FINDS that the State of New Mexico has not delegated to the Federal Government exclusive jurisdiction of paternity suits brought in the State of New Mexico;

This State has retained jurisdiction and the Plaintiff exercises a valid and proper right in this Court.

IT IS THEREFORE ORDERED that the Defendant's Motion to Dismiss be, and hereby is, denied.

_____
District Judge

Submitted:

_____
Leo C. Kelley, Attorney for Plaintiff

Verified Allegations That Jurisdiction Does Not Lie in State Courts of New Mexico, Made to the Supreme Court of New Mexico August 14, 1981 in Request for Writ of Prohibition Which Was Denied.

"That the Complaint filed herein by Esther Antonio alleged that she was residing in Bernalillo County, New Mexico at the time of filing, April 6, 1979, and alleged that the child, Rachel Antonio, was born May 11, 1975, in Presbyterian Hospital. The Complaint and Amended Complaint were secret as to where the residence of the Plaintiff at the time during that period when conception could have taken place.

It has now been disclosed through documents obtained, June 11, 1981, that during the period when the conception of Rachel Antonio was possible, Esther Antonio was a resident on the Navajo Reservation and was not residing, or a resident of New Mexico at that time.

A copy of this document signed by Esther Antonio is attached and shows that the "date arrived in this state" was "November 21, 1974". That prior to that, the document shows that Plaintiff Esther Antonio resided at the "Continental Divide" which was her address on the Navajo Reservation where she is registered as a full-blooded Navajo Indian. That she was a resident on the Navajo Reservation all her life is shown by the document wherein she states that she had resided there "36 years, off and on", "Exhibit D".

That the said evidence shows her to have been a member of the Navajo Nation with her residence on the Residence on the Reservation at the time Rachel Antonio could have been conceived.

That an Affidavit of Dr. Bennett who cared for Esther Antonio from January 20, 1975, until the delivery of Rachel Antonio on May 11, 1975, is attached hereto showing that conception was not possible in November, 1974, "Exhibit E".

That her legal residence being on the reservation at the times aforesaid did not confer jurisdiction upon the New Mexico State Courts.

That Esther Antonio has filed an Affidavit below alleging without being asked to do so, that she registered in an Albuquerque motel on several occasions, the dates at which she could not remember, during the month of September, 1974, and not before and requested the Petitioner to come to such transient motel where she asserts sexual relations occurred. Exhibit —— shows that she was residing on the Navajo Reservation, and not in the State of New Mexico until November, 1974.

That until June, 1981, it was not known that the Plaintiff below was residing on the Reservation before November 21, 1974.

By Resolution CJA-1-5, passed January 6, 1959, the Navajo Tribal Council adopted as Tribal law the regulation of the Department of the Interior contained in 25 C.F.R., § 11.30 which states:

> "The Court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child."

That her legal residence being on the Reservation aforesaid did not confer jurisdiction upon New Mexico state courts."

ARGUMENT AND AUTHORITIES

Point I

The Status of the Child as an Enrolled Member of the Navajo Tribe Is Not Disturbed by Any Decision in the State District Court.

The District Court has jurisdiction over the subject matter and persons in the cause of action of Esther Antonio v. Richard Rock, No. DR-79-01505. It is a paternity action to determine the status of Richard Rock with respect to the minor child of Esther Antonio. The Petitioner-Defendant, Richard Rock is not an Indian. This action in no way affects the tribal membership of the minor child of Esther Antonio, a full-blood Navajo. Under the Navajo Tribal Code, the child has automatic tribal membership. Therefore, the rights and benefits which accrue to the child as a result of membership are not disturbed by a determination of paternity by the District Court. 1 N.T.C. § 101 states:

> "The membership of the Navajo Tribe shall consist of the following persons: . . .
>
> (c) Children born to any enrolled member of the Navajo Tribe shall automatically become members of the Navajo Tribe and shall be enrollled, provided they are at least one-fourth degree Navajo blood."

The child whose paternity is to be determined was born to an enrolled member of the Navajo Tribe. The child's membership is automatic. Tribal membership is not an issue in the instant proceeding. Because tribal membership is not an issue before the Court, jurisdiction over the paternity determination in no way infringes on tribal self-government. The State District

* * * * * * * * * *

CONCLUSION

State Court jurisdiction is appropriate in this cause of action for the determination of paternity of the minor child of Esther Antonio. The Navajo Tribal Code affords this child automatic tribal membership because she was born to a full-blooded Navajo Indian. The determination of paternity will not disturb the status of the child with respect to the Navajo Tribe. Therefore, no tribal self-government is infringed upon. The issue before the State District Court is whether or not Richard Rock is the father of the child and will therefore be required to provide financial support.

The facts are that Richard Rock is not an Indian and that the cause of action arose outside the exterior boundaries of the Indian reservation. These two facts distinguish this case from those cases which have granted Tribal Court jurisdiction. Where the cause of action arose on Indian land and the defendant is Indian, Tribal Court jurisdiction is appropriate. This is not such a case, and the District Court has jurisdiction over the plaintiff, the defendant and this cause of action.

Leo C. Kelly
P.O. Box 304
Albuquerque, New Mexico 87103
505-842-9400
Attorney for Respondent

Exhibit "F"

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

No. DR 79-01505

ESTHER ANTONIO, *Plaintiff*,

vs.

RICHARD ROCK, *Defendant*.

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

JOHN A. BENNETT, M.D., being duly sworn upon his oath deposes and states:

I am a physician praciticing in the City of Albuquerque, New Mexico, specializing in Obstetrics and Gynecology.

I attended college at the Unitersity of Utah, where I graduated in 1958. Thereafter, I attended Cornell Medical School, where I graduated in 1961. I completed a two year internship/residency at Roosevelt Hospital in New York City, New York. I completed a three and one half year residency in Obstetrics and Gynecology at Woman's Hospital in New York City. I specialized in the practice of Obstetrics and Gynecology in the United States Army for three and one fourth years. I have been actively practicing specializing in the area of Obstetrics and Gynecology in Albuquerque, New Mexico since June, 1970. I am a board certified Fellow of the American College of Obstetrics and Gynecology. I have been licensed to practice medicine in New Mexico since 1970.

Esther Antonio, the plaintiff in this case, has been a patient of mine since September, 1972, at which time she was referred to me by Dr. Richard Rock.

The first time I saw Ms. Antonio for her pregnancy was January 20, 1975. At that time I obtained a history from her which indicated that her last menstrual period had been August 24, 1974, approximately twenty one and one half weeks before the first visit. The patient's uterus was already at the umbilicus. The baby's heart was audible with a regular fetoscope. Ms. Antonio subsequently came into labor on May 11, 1975, but never dilated because she was suffering from toxemia, so a Caesarean Section was performed on May 11, 1975. A six pound, six ounce baby was delivered.

On the first obstetrical visit on January 20, 1975, a baby heart was heard with a regular fetoscope which would be consistent with at least twenty weeks gestation, i.e., from the last menstrual period, i.e, eighteen weeks from conception. Ms. Antonio was felt not to be any more than twenty-two weeks, that is, twenty weeks from conception.

On the basis of a delivery date of May 11, 1975, of a baby weighing six pounds, six ounces, which is slightly less than average, but at term (38-42 weeks), it is my opinion to a reasonable medical probability, that Esther Antonio conceived on or about the last week of August or the first week in September, 1974. Given all of the physical facts which I have stated, the outer limits of time at which she could have conceived is plus or minus two weeks.

Further, that the above statements are true and correct as to the best knowledge and belief of the affiant.

/s/ John A. Bennett, M.D.
John A. Bennett, M.D.

Subscribed and sworn to before me this 4th day of August, 1981.

/s/ Jim Buskirn Wagner
Jim Buskirk Wagner
Notary Public

My Commission Expires:
11-17-84

Exhibit "E"

The Navajo Tribe has expressly claimed jurisdiction over paternity actions. The jurisdiction manual of the Navajo Tribe provides that the Tribe has jurisdiction over all domestic relations matters involving Indiana T.7, § 133 of the Navajo Tribal Code, 1969 Edition. By Resolution CJA-1-5, the Navajo Tribal Council adopted as Tribal Law the regulation of the Department of the Interior contained in 25 C.F.R. § 11.30 which states:

> The Court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child.

The Navajo Tribal Council has claimed original jurisdiction to the Court of Indian Offenses of all proceedings to determine the paternity of Navajo children.

New Mexico's Supreme Court, in its discussion in *Natewa v. Natewa* 84 N.M. 69, 499 P. 692 recognized this exclusive jurisdiction of the Navajo Nation on paternity actions involving its members.

25 U.S.C. § 1322 et seq is entitled, "Assumption by state of civil jurisdiction." This can only be done with the consent of the State and the Indian Nation. Neither the State of New Mexico nor the Navajo Nation have consented.

Exhibit "G"

Opposite the arrow is the date, stated by the mother as to when she entered the State of New Mexico.

Exhibit "K"

THE COURT: Okay, gentlemen, thank you.

I understand the position taken by the defendant in this case; however, I don't see this case as a quasi-criminal case at all. I see this basically as a civil action to establish paternity.

The statute referred to, before it would have any applicability, there's two conditions, one of which would have to come into being before there could be any liability. Number one, there would have to be a judicially established paternity, which is the purpose of this lawsuit, or he would have had to acknowledge in writing that he was the father. And in addition to that, there would still have to be shown, before he could ever be convicted of any crime, that he did this without any lawful excuse as far as providing shelter, etcetera, etcetera.

I don't see any in that relationship. I don't think that the questions that are asked for purposes of establishing an acquaintanceship or relationship, intercourse or matters of that kind are protected under the Fifth Amendment.

It will be the order of the Court that Doctor Rock answer the related questions that are asked of him on his deposition.

I'll give you—I'll delay any entry of order on this for a period of five days, Mr. Klecan, which will give you a chance to get a writ of prohibition or any other extraordinary remedy that you think is appropriate, but it's the order of the Court that Doctor Rock answer the questions propounded to him on the deposition insofar as they are material and relate to the issues in this particular lawsuit.

Exhibit "XX"

1. Are you acquainted, Dr. Rock, with a lady named Esther Antonio?

A. 5th

2. Have you ever met a woman named Esther Antonio?

A. 5th

3. Have you ever met or are you acquainted with a child named Rachel Antonio?

A. 5th

4. Do you have knowledge of any person who had sexual intercourse with Esther Antonio during the months of July, August and September 1974?

A. We raise the 5th as to any knowledge about her so that would cover any question that would deal with her activities of any kind. We raise the 5th as to that question

5. Do you have evidence of any sort of information of any sort that the child Rachel Antonio, who Esther Antonio alleges was fathered by you, Dr. Rock, was fathered by any other individual?

A. We would raise the 5th as to any information of knowledge about her or what she did or didn't do. So we would raise the 5th as to that question.

6. Have you ever discussed the parentage of Rachel Antonio with Esther Antonio?

A. 5th

7. Has Esther Antonio ever told you that you were the father of Rachel Antonio?

A. 5th

8. Have you ever told anyone that you were the father of the child, Rachel Antonio?

A. 5th

9. Have you ever told Esther Antonio that somebody else was the father of Rachel Antonio?

A. 5th

(12) 10. Have you ever contributed any money to the support of the child, Rachel Antonio?

A. 5th

(13) 11. Did you ever give money to an attorney named Brad Zeikus to be conveyed to Esther Antonio?

A. 5th

(14) 12. Did you give money to Brad Zeikus for the purpose of paying the hospital a bill for expenses incurred in the birth of Rachel Antonio?

A. 5th

(15) 13. Did you ever visit with Rachel Antonio and Esther Antonio at Esther's apartment in the City of Albuquerque

A. 5th

(23) 14. Did she show you also a copy of any check from Attorney Brad Zeikus' office issued to Esther Antonio?

A. That question assumes an answer to the other question to which there has been an objection made.

(34) 15. To your knowledge, Dr. Rock, did your wife discuss this case with the F.B.I. sometime after February 12, 1979?

A. Again, the only way that he would find out presumably would be a question of a confidential privileged communication between husband and wife, so that in addition to the 5th Amendment, you are tying it into the facts of this particular lawsuit. There would be at least two reasons why it would be objectionable.

(35) 16. Have you ever had sexual relations with Esther Antonio

A. 5th

(36) 17. During the period 1964 to 1966, did you meet Esther Antonio?

A. 5th

(37) 18. During the period 1964 to 1966, did you have sexual relations with Esther Antonio?

A. 5th

(38) 19. How often during the period 1964 to 1966, did you have sexual relations with Esther Antonio?

A. 5th

(39) 20. If you did not meet Esther Antonio during the period 1964 through 1966, when did you first meet Esther Antonio?

A. 5th

(40)21. When did you have sexual relations with Esther Antonio for the first time?

A. 5th

(41) 22. When did you first have sexual relations with Esther Antonio in the City of Albuquerque?

A. 5th

(42) 23. How frequently did you have sexual relations with Esther Antonio during the calendar year 1974?

A. 5th

(45) 24. Other than monies that you may have given Brad Zeikus for conveyance to Esther Antonio for the support of Rachel Antonio, did you give Esther Antonio other money in the form of cash for the support of Rachel Antonio?

A. 5th

ARTICLE 5

Illegitimacy and Support

Sec.

40-5-1. Child's right to support.

40-5-2. Amount of support; liability for expenses.

40-5-3. Action to recover equal shart of support; demand limitation.

40-5-4. Third parties' right to sue.

40-5-5. Discharge of obligations; adoption of child.

40-5-6. Proceedings not exclusive.

40-5-7. Proceedings to compel support; who may bring.

40-5-8. When proceedings may be instituted.

40-5-9. Jurisdiction of proceedings to compel support and establish parentage; form of complaint; summons; procedure.

40-5-10. Continuance until child born.

40-5-11. Testimony by father and mother permitted.

40-5-12. Failure of defendant to appear; trial to proceed.

40-5-13. Death or absence of mother; trial to proceed; dying declaration.

40-5-14. Death of a parent; prosecution against personnel representative.

40-5-15. Judgment of parentage and support.

40-5-16. Payments to mother or trustee; reports of trustee.

40-5-17. Enjoining transfer of property; attachment and garnishment; judgment a lien on real estate.

40-5-18. Agreement for support; approval of court; bar of other remedies.

40-5-19. Continuing jurisdiction of court.

40-5-20. Failure to support child; penalty.

40-5-21. Failure to comply with judgment for support of child; penalty.

40-5-22. Criminal prosecution; civil proceedings not affected.

40-5-23. Limitation of actions.

40-5-24. Foreign judgments; suit in this state.

40-5-25. References to illegitimacy; sufficiency.

40-5-26. Application of act.

40-5-1. Child's right to support.

The father and mother of a child born out of wedlock are jointly and severally liable for the support of the child until he reaches the age of majority.

40-5-4. Third parties' right to sue.

The obligation of the father or mother creates also a cause of action on behalf of their legal representatives or on behalf of third parties furnishing support or defraying the expenses thereof where parentage has been judicially established, or where parentage has been acknowledged in writing or by the part performance of the parental obligations.

40-5-5. Discharge of obligations; adoption of child.

The support obligation of a parent is discharged by complying with a judicial decree for support or with the terms of a judicially approved settlement. The adoption of the child into another family discharges the obligation for the period subsequent to the adoption.

40-5-7. Proceedings to compel support; who may bring.

The proceeding to compel support and establish parentage of the child may be brought by a parent or if the

child is or is likely to be a public charge, by the state of New Mexico. After the death of the complainant parent or in the case of his disability, it may also be brought by the child, acting through his guardian or next friend. If the proceeding is brought by the public authorities, the parents may be made defendants.

40-5-9. Jurisdiction of proceedings to compel support and establish parentage; form of complaint; summons; procedure.

Jurisdiction over proceedings to compel support and establish parentage of the child is vested in the district court of the county in which either parent permanently or temporarily resides, or is found. It is not a bar to the jurisdiction of the court that the complainant parent and child reside in another state. The complaint shall be filed in the district court having jurisdiction and shall charge the person named as defendant with being the father or mother of the child and demand that such person be compelled to support the same, and it may contain such facts relating to the property of the defendant as are within the knowledge of the complainant.

Summons shall be issued and served as in other civil actions, and the cause shall be tried by jury, unless jury trial be waived by the parties. The procedure shall be the same as in other civil actions.

40-5-11. [Testimony by father and mother permitted.]

Both the mother and the alleged father shall be competent, but not compellable, to give evidence and if neither gives evidence, he or she shall be subject to cross-examination.

40-5-15. Judgment of parentage and support.

If the finding or verdict be against the defendant, the court shall give judgment against him declaring parentage and for support of the child. The judgment shall be

for annual amounts, equal or varying, having regard for his obligation under Section 40-5-2 NMSA 1978 as the court directs, until the child reaches the age of eighteen years or sooner dies. The payments may be required to be made at such period or intervals as the court directs. In addition to the judgment for support, there may be a judgment for reasonable attorney fees.

40-5-19. [Continuing jurisdiction of court.]

The court has continuing jurisdiction over proceedings brought to compel support and to increase or decrease the amount thereof, until the judgment of the court has been completely satisfied, and also has continuing jurisdiction to determine custody in accordance with the interests of the child.

40-5-20. Failure to support child; penalty.

The failure of either spouse, without lawful excuse to support the child where parentage has been judicially established, or has been acknowledged in writing or by the part performance of parental obligations, is punishable by a fine not exceeding one thousand dollars ($1,000) or by imprisonment in the penitentiary for not exceeding two years, or by both such fine and imprisonment. Proof of the omission by either parent to furnish necessary food, clothing, shelter, medical attention or other remedial care for his child is prima facie evidence of failure to support the child without lawful excuse.

40-5-21. Failure to comply with judgment for support of child; penalty.

The failure, without lawful excuse, of a parent to comply with and carry out a judgment for the support of the child, whether the child be a resident in the jurisdiction where the judgment was rendered or not, is punishable by a fine not exceeding one thousand dollars ($1,000),

or by imprisonment in the penitentiary for not exceeding two years, or by both such fine and imprisonment, at the discretion of the court.

40-5-22. Criminal prosecution; civil proceedings not affected.

A criminal prosecution brought in accordance with the provisions of Section 40-5-20 NMSA 1978 or Section 40-5-21 NMSA 1978, shall not be a bar to, or be barred by, civil proceedings to compel support.

40-5-23. Limitation of actions.

Proceedings to enforce the obligation of the father shall not be brought after the lapse of more than two years from the birth of the child unless paternity has been judicially established or has been acknowledged by the father in writing or by the furnishing of support, except that there shall be no time limitation on proceedings initiated by the state.

Verified assertion to Supreme Court of New Mexico of August 14, 1981 relating to Fifth Amendment protection stated:

> That an examination of the questions that the court has ruled must be answered shows that the 5th Amenment should be allowed as a bar to answering most if not all of said questions, ones for which the 5th Amendment is properly invoked. The basis for the use of the 5th Amendment for this New Mexico case is found in N.M.S.A. 1978 Annotated, Section 40-5-20 and perhaps other statutes. The statute states, "The failure of either spouse, without lawful excuse, to support, the child, whose parentage has been judicially established, or has been acknowledged in writing or by the past performance of parental obligations is punishable by a find not exceeding One Thousand Dollars ($1,000.00), or by imprisonment in the

penitentiary for not exceeding two years, or by both such fine and imprisonment. Proof of the omission by either parent to furnish necessary food, clothing, shelter, medical attention or other remedial care for his child is prima facie evidence of failure to support the child without lawful excuse."

CERTIFICATE OF LIVE BIRTH

STATE OF NEW MEXICO

130-75-007061

1. PLACE OF BIRTH
a. COUNTY: Bernalillo
b. CITY OR TOWN: Albuquerque
c. FULL NAME OF (If NOT in hospital or institution, give street address or location) HOSPITAL OR INSTITUTION: Presbyterian Hospital Center

2. USUAL RESIDENCE OF MOTHER (Where she usually lives)
a. STATE: New Mexico
b. COUNTY: Bernalillo
c. CITY OR TOWN: Albuquerque
d. STREET ADDRESS (If rural, give location): 310 Pennsylvania S E

3. CHILD'S NAME (Type or Print)
a. (First)
b. (Middle)
c. (Last): Antonio

4. SEX: Female
5a. THIS BIRTH: Single [X] Twin [ ] Triplet [ ]
5b. IF TWIN or TRIPLET (This one born) 1st [ ] 2nd [ ] 3rd [ ]
6. DATE OF BIRTH (Month) (Day) (Year): May 11, 1975

FATHER OF CHILD

7. FULL NAME a. (First) b. (Middle) c. (Last)
8. COLOR OR RACE
9. AGE (At time of this birth) YEARS
10. BIRTHPLACE (State or foreign country)
11a. USUAL OCCUPATION
11b. KIND OF BUSINESS OR INDUSTRY

MOTHER OF CHILD

12. FULL MAIDEN NAME a. (First): Esther b. (Middle): Ruth c. (Last): Antonio
13. COLOR OR RACE: Navajo Indian
14. AGE (At time of this birth): 37 YEARS
15. BIRTHPLACE (State or foreign country): New Mexico
16. PARENTS MAILING ADDRESS FOR REGISTRATION NOTICE: 310 Pennsylvania S E, Albuquerque, New Mexico 87106
17. INFORMANT'S NAME AND ADDRESS: Esther Ruth Antonio

I hereby certify that the child was born alive on the date stated above at 7:51P

SIGNATURE: John A. Bennett, M.D.
ADDRESS: Albuquerque, New Mexico

18b. ATTENDANT AT BIRTH: M.D. [ ] [ ] (Other) (Specify)
18c. DATE SIGNED: 5/16/75
19. DATE RECEIVED BY LOCAL REG.
20. REGISTRAR'S SIGNATURE
21. DATE ON WHICH CHILD'S NAME ADDED BY (Registrar)

CERTIFIED COPY OF VITAL RECORD

STATE OF NEW MEXICO COUNTY OF SANTA FE

Michael J. Burkhart, Director
Health Services Division
Health and Environment Department

This is a true and exact reproduction of the original document officially registered and placed on file in the Vital Records Section of the Health and Environment Department in Santa Fe, New Mexico, and issued under the authority of the State Registrar of Vital Statistics.

DATE ISSUED: OCT 16 '79

Michael W. Ammann
Michael W. Ammann
State Registrar
Vital Statistics

DO NOT DUPLICATE THIS COPY BY ANY MEANS WHATSOEVER.

SECURITY PAPER DISPLAYING THE RAISED SEAL OF THE STATE REGISTRAR. (NMSA, 1953 Sec. 14-4-4.8)

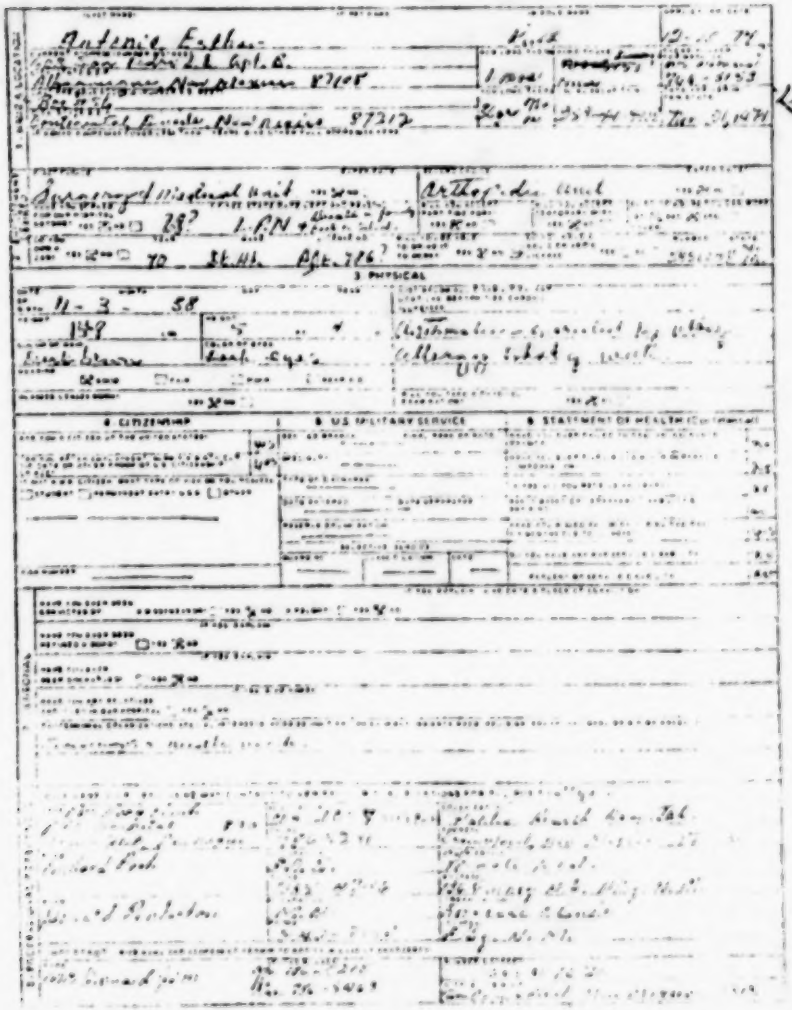
Best Copy Available

Inspector has arrow to the date, noted by the author as to when she entered the state of New Mexico.

UNIVERSITY HEIGHTS HOSPITAL
1127 UNIVERSITY BLVD., N.E.
ALBUQUERQUE, NEW MEXICO 87102

AN EQUAL OPPORTUNITY EMPLOYER

APPLICATION FOR EMPLOYMENT



Office - Supreme Court, U.S.
FILED
MAR 16 1982
ALEXANDER L. STEVAS,

No. 81-1034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF NEW MEXICO, ex rel RICHARD ROCK,
Petitioner,

v.

HON. HARRY E. STOWERS, JR.,
Respondent.

Appeal From The Supreme Court Of The State Of New Mexico

MOTION TO DISMISS

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Appeal From The Supreme Court Of The State Of New Mexico

MOTION TO DISMISS

Comes now Esther Antonio, the real party in interest, and moves the Court to dismiss the within-captioned appeal and as grounds therefor states:

I. The Federal Question Sought to be Reviewed was not Timely Appealed.

II. No Substantial Federal Question is Presented by the Appeal.

STATEMENT OF THE FACTS

Esther Antonio, Plaintiff below, is a Navajo Indian and citizen of the State of New Mexico. Richard Rock, Defendant below, is a non-Indian citizen of the State of New Mexico.

Esther Antonio filed suit against Richard Rock alleging that he is the father of her child Rachael Antonio, conceived in Albuquerque, New Mexico, and born in Albuquerque, New

Mexico on or about May 11, 1975. Antonio further alleges that Rock contributed to the support of Rachael from the date of her birth until shortly before she filed the paternity suit on April 4, 1979.

Richard Rock denies paternity.

STATEMENT OF THE CASE

All references to Exhibits are to the Partial Transcript of Proceedings lodged in the Supreme Court of the United States, a complete copy of which has been provided to the Petitioner.

Antonio filed her complaint against Richard Rock on April 4, 1979 (EXHIBIT A). Antonio filed a First Amended Complaint on August 30, 1979 (EXHIBIT B). Rock filed a Motion to Dismiss on September 7, 1979 (EXHIBIT C). That Motion was denied on December 14, 1979 (EXHIBIT D). Rock filed an Answer to First Amended Complaint on September 7, 1979 (EXHIBIT E).

Rock filed a Petition for Writ of Prohibition in the Supreme Court of New Mexico on December 14, 1979 (EXHIBIT F). The Supreme Court of New Mexico issued an Alternative Writ on December 19, 1979 (EXHIBIT G). Antonio filed an Answer to Writ of Prohibition on December 26, 1979 (EXHIBIT H). Rock filed a Brief in Support of Petition for Writ of Prohibition on January 10, 1980 (EXHIBIT I). Antonio filed an Answer to Brief in support of the Petition for Writ of Prohibition on January 21, 1980 (EXHIBIT J). By Order entered January 30, 1980 the Supreme Court of New Mexico quashed the Alternative Writ issued on December 19, 1979 (EXHIBIT K).

Rock filed another Petition for Writ of Prohibition in the New Mexico Supreme Court on April 17, 1980 (EXHIBIT L). An Alternative Writ was issued on April 23, 1980 (EXHIBIT M). Antonio filed an Answer to Petition for Writ of Prohibition on April 30, 1980 (EXHIBIT N). Rock filed a Petitioner's Brief in

Support of Petition for Writ of Prohibition on May 7, 1980 (EXHIBIT O). Antonio filed a Brief in Opposition to Petition for Writ of Prohibition on May 14, 1980 (EXHIBIT P). By order entered May 21, 1980, the New Mexico Supreme Court quashed the Alternative Writ previously granted on April 23, 1980 (EXHIBIT Q).

Rock filed yet another Petition for Alternative Writ of Prohibition in the New Mexico Supreme Court on October 15, 1980 (EXHIBIT R). The New Mexico Supreme Court issued an Alternate (sic.) Writ of Prohibition on October 22, 1980 (EXHIBIT S). Antonio filed a Response to Petition for Alternate Writ of Prohibition on October 28, 1980 (EXHIBIT T). Rock filed a Petitioner's Brief on November 5, 1980 (EXHIBIT U). Antonio filed a Brief in Opposition to Petition for Writ of Prohibition on November 12, 1980 (EXHIBIT V). By order entered November 19, 1980, the Supreme Court of New Mexico quashed the Alternative Writ previously issued on October 22, 1980 (EXHIBIT W).

Rock filed his fourth Petition for Writ of Prohibition in the Supreme Court of New Mexico on August 14, 1981 (EXHIBIT X). By order entered August 19, 1981, the New Mexico Supreme Court denied Rock's application (EXHIBIT Y). By order entered August 24, 1980, the New Mexico Supreme Court denied Rock's Request for a Stay of Proceedings (EXHIBIT Z).

On August 31, 1981, Rock filed a Notice of Appeal to the Supreme Court of the United States from the final order of the Supreme Court of New Mexico entered August 19, 1981 (EXHIBIT AA).

ARGUMENTS AND AUTHORITIES

I. The Federal Question Sought To Be Reviewed Was Not Timely Appealed.

Notice of Appeal to the Supreme Court of the United States was filed August 31, 1981. While Petitioner says he is appeal-

ing from the Order of the New Mexico Supreme Court entered August 19, 1981, he is in reality appealing from the Order of the Court entered January 30, 1980.

In his brief filed January 10, 1980, the Petitioner raised the same jurisdictional question he raised in his Petition for Writ of Prohibition filed August 14, 1981. Compare EXHIBIT I and EXHIBIT X.

The New Mexico Supreme Court requires Motions for Rehearing to be filed "within ten (10) days after entry of the Appellate Court's decision." Rule 19(a) New Mexico Rules of Appellate Procedure (EXHIBIT BB). Petitioner filed no such motion.

Time for appeal of the January 30, 1980 judgment to the United States Supreme Court ran on April 29, 1980. 28 U.S.C. Sec. 2101(c). Petitioner filed no Notice of Appeal from the judgment.

This Court addressed the situation in this case in *F.T.C.* v. *Minneapolis-Honeywell*, 344 U.S. 206 (1952) wherein it was said:

> "The test is a practical one. The question is whether the lower Court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality."

The judgment of August 31, 1981 plainly does not meet this test. Petitioner asked the New Mexico Supreme Court to do precisely the same thing he had asked it to do in January, and which the Court refused to do in its judgment entered January 30, 1980.

Litigation must at some point be brought to an end. *F.T.C.* v. *Minneapolis-Honeywell*, supra; see *Matton Steamboat Co.* v. *Murphy*, 319 U.S. 412, 415 (1943). Litigation of Petitioner's jurisdictional argument came to an end when he failed to appeal the New Mexico Supreme Court's judgment entered January 30, 1980.

II. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPEAL.

A. The Status Of The Child As An Enrolled Member Of The Navajo Tribe Is Not Disturbed By Any Decision In The State District Court.

The New Mexico State District Court has jurisdiction over the subject matter and persons in the cause of action of Esther Antonio v. Richard Rock, No. DR-79-01505. It is a paternity action to determine the status of Richard Rock with respect to the minor child of Esther Antonio. The Petitioner-Defendant, Richard Rock is not an Indian. This action in no way affects the tribal membership of the minor child of Esther Antonio, a full-blood Navajo. Under the Navajo Tribal Code, the child has automatic tribal membership. Therefore, the rights and benefits which accrue to the child as a result of membership are not disturbed by a determination of paternity by the State District Court. 1 N.T.C. sec. 101 states:

> "The membership of the Navajo Tribe shall consist of the following persons: . . .
>
> (c) Children born to any enrolled member of the Navajo Tribe shall automatically become members of the Navajo Tribe and shall be enrolled, provided they are at least one-fourth degree Navajo blood."

The Child whose paternity is to be determined was born to an enrolled member of the Navajo Tribe. The child's membership is automatic. Tribal membership is not an issue in the instant proceeding. Because tribal membership is not an issue before the Court, jurisdiction over the paternity determination in no way infringes on tribal self-government. The State District Court will determine the nature of the support obligation of the Petitioner-Defendant to the minor child of Esther Antonio. Therefore, cases relied upon by the Petitioner which hold that the Tribal Court has jurisdiction with respect to membership questions, are not applicable here.

B. Determination Of Paternity In The State District Court Does Not Infringe Upon The Governmental Powers Of The Tribe.

Petitioner relies on cases and doctrines of Indian law which are not applicable to the instant case. The determination of paternity does not violate the infringement test put forth in *Williams* v. *Lee*, 358 U.S. 217, 79 S.CT. 269, 3 L.Ed. 251 (1959). The result of the determination of paternity will be to decide whether or not the putative father will be required to provide the child with financial support. Since the putative father is not Indian, tribal laws and tribal self-government are not affected. In *Natewa* v. *Natewa*, 84 N.M. 69, 499 P.2d 691 (1972), the Court states, in essence, that an Indian may not escape the responsibilities of child support payments by hiding on an Indian reservation. Similarly, obligations and responsibilities cannot be abandoned or avoided by a citizen of the State of New Mexico on the grounds that the beneficiary of the obligations is an Indian.

The determination of paternity of the child in this case in no way affects lands belonging to or set aside for Indians, the basis for the holding in *Chino* v. *Chino*, infra. It in no way affects the regulation of the internal affairs of the tribe, the basis for the holding in *Williams* v. *Lee*, supra. It may, however, provide benefits for the child which, as a matter of moral and social policy, will enhance her life. These benefits do not affect the rights and benefits afforded her as a consequence of her Navajo heritage.

In *United States* v. *Candelaria*, 271 U.S. 432, 64 S.Ct. 561, 70 L.Ed. 1023 (1925), the United States Supreme Court allowed states to exercise their authority in some cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized. The infringement test put forth by *William* v. *Lee*, supra, is applicable where the state action infringes on the right of reservation Indians to make their own laws and be ruled by them. State Court jurisdiction over a

paternity action where the mother is Navajo and the putative father is not an Indian in no way infringes upon the tribe's right to make its own laws and be governed by them.

In *Chino* v. *Chino*, 90 N.M. 203, 561 P.2d 476 (1977), the Court lists three criteria relevant to the determination of whether or not the application of State law would infringe upon the self-government of the Indians. These are (1) whether the parties are Indians or non-Indians, (2) whether the cause of action arose within the Indian reservation, and (3) the nature of interest to be protected. Here only one party is an Indian who does not reside within the exterior boundaries of the Indian reservation, the cause of action did not arise on Indian land, and the interests to be protected are those of the minor child with respect to her parentage and her right to financial support from the putative father. Jurisdiction in the State District Court over this cause of action is appropriate under *United States* v. *Candelaria*, supra, because tribal relations are not involved and the rights of Indians are not jeopardized.

Jurisdiction in the State District Court is appropriate because the right of the tribe to make laws and be governed by them is not infringed as it was in *Williams* v. *Lee*, supra. The cause of action in *Williams* v. *Lee*, supra, arose out of a contract entered into by an Indian with a non-Indian on reservation land. To hold that the State District Court has no jurisdiction over this cause of action under *Williams* v. *Lee*, supra, extends the infringement test beyond the scope of the holding in that case.

In *Chino* v. *Chino*, supra, the State District Court had no jurisdiction because the cause of action required a determination of Indian property rights with respect to property located within the boundaries of the reservation. The determination of paternity where the putative father is a non-Indian does not in any way require the determination of property rights within the reservation. *Chino* v. *Chino*, supra, is distinguishable not only on the facts, but also on the ultimate issue of State Court

jurisdiction over Indian property rights. The holding in *Chino* v. *Chino*, supra, has no application to the instant case, nor can there be a reasonable basis for its extension to determination of paternity.

C. The Tribal Court Does Not Have Jurisdiction Over The Defendant Nor Does It Have Exclusive Jurisdiction Of The Subject Matter.

Only the federal government can grant jurisdiction to Tribal Courts. Specifically 25 CFR sec. 11.22 states:

> "The Court of Indian Offenses shall have jurisdiction of all suits wherein the *defendant* (emphasis added) is a member of the tribe or tribes within their jurisdiction, and all other suits between members and non-members by stipulation of both parties . . . "

The language states that Tribal Court jurisdiction exists where the Defendant is an Indian. Richard Rock is the Defendant, but he is not an Indian. Therefore, the Tribal Court does not have jurisdiction absent a stipulation by both parties. There is no such stipulation here.

The language of 25 CFR sec. 11.22 was construed by the New Mexico Supreme Court in *State Securities, Inc.* v. *Anderson*, infra. The Court held that this section confers original but not exclusive jurisdiction to the Tribal Court:

> "We believe that 25 CFR sec. 11.22 and Title 7 of the Navajo Tribal Code, sec. 133, confer original but not exclusive jurisdiction. There are two important reasons. First providing Indian courts with exclusive jurisdiction in every action where an Indian is a Defendant would be establishing abnormal jurisdiction, both in terms of what is presently exercised by other governmental units in the United States and what is necessary to achieve justice." at page 787.

Thus, even where the defendant is Indian, the Tribal Court does not have exclusive jurisdiction in all instances. Petitioner seeks

a holding to grant exclusive jurisdiction to the Tribal Court where the defendant is not an Indian and the Cause of action does not affect tribal self-government. Under *State Securities, Inc.* v. *Anderson*, infra, such a grant of exclusive jurisdiction over a non-Indian would "establish abnormal jurisdiction."

As a second important reason for not establishing exclusive jurisdiction in the Tribal Court, the Court in *State Securities, Inc.* v. *Anderson*, infra, states:

> ". . . Even the United States Supreme Court construing the words 'absolute jurisdiction and control,' has decided that 'absolute federal jurisdiction' is not invariably exclusive jurisdiction." (citations omitted.)

The Petitioner, by seeking exclusive jurisdiction in the Tribal Court, is attempting to create a jurisdictional base in the Tribal Court more extensive than that granted by the federal government. Congress has exclusive power to regulate the Indian tribes. It has not conferred exclusive jurisdiction upon the Indian Courts. "Congress has therefore not prohibited jurisdiction by State Courts." *State Securities, Inc.* v. *Anderson*, infra, at pages 787-788.

In the matter before the Court, State Court jurisdiction does not interfere with Indian self-government. Here jurisdiction in the State Court is appropriate for the same reasons as the Court held in *State Securities, Inc.* v. *Anderson*, infra.

> "We believe that state jurisdiction is proper in cases between Indians and non-Indians involving contractual obligations incurred off the reservation . . ." (page 789).

Petitioner asserts that 25 CFR sec. 11.30 grants exclusive jurisdiction to Tribal Courts with respect to a paternity action. The language in 25 CFR sec. 11.30 is the same as the language in 25 CFR sec. 11.22, interpreted by the Court in *State Secur-*

ities, Inc. v. *Anderson*, 84 N.M. 629, 506 P.2d 786 (1973). Section 11.30 states in part:

> "The Court of Indian Offenses shall have jurisdiction of all suits . . . "

This same language is used in 25 CFR sec. 11.22 and is a grant of general jurisdiction. It was held in *State Securities, Inc.* v. *Anderson*, supra, not to be an exclusive grant of jurisdiction. Similarly, 25 CFR sec. 11.30 cannot be construed to be a grant of exclusive Tribal Court jurisdiction. Jurisdiction is concurrent.

Petitioner asserts that this Indian Plaintiff cannot avail herself of the State Courts. New Mexico cases have repeatedly held that Indian citizens are not to be denied access to State Courts. *Batchelor* v. *Charley*, 389 P.2d 49, 74 N.M. 717 (1965), *Martinez* v. *Martinez*, 157 P.2d 484, 49 N.M. 83 (1945). Felix Cohen said, in his *Handbook of Federal Indian Law*, University of New Mexico Press, 1958 Ed., at page 379:

> "In matters not affecting either the federal government or tribal relations, an Indian has the same status to sue and be sued in State Courts as any other citizen."

Even the most recent federal legislation with respect to Indians, the Indian Child Welfare Act of 1978, grants not exclusive, but concurrent jurisdiction to the State and Tribal Courts *unless* (emphasis added) the parent objects. When a parent does object to Tribal Court jurisdiction, any action under the Indian Child Welfare Act of 1978 can be tried in the State Courts. Thus, Congressional intent is not to lock an Indian Plaintiff into the Tribal Court, but to allow the Indian citizen a choice of forums. The Plaintiff, Esther Antonio, has chosen to bring her cause of action in the State Court. She should not be denied access to the State Court.

CONCLUSION

This case was not timely appealed to the Supreme Court of the United States and the appeal should be denied for lack of jurisdiction.

In the event the Court disagrees with respondent's jurisdictional argument, the Court should find that State Court jurisdiction is appropriate in this cause of action for the determination of paternity of the minor child of Esther Antonio. The Navajo Tribal Code affords this child automatic tribal membership because she was born to a full-blooded Navajo Indian. The determination of paternity will not disturb the status of the child with respect to the Navajo Tribe. Therefore, no tribal self-government is infringed upon. The issue before the State District Court is whether or not Richard Rock is the father of the child and will therefore be required to provide financial support.

The facts are that Richard Rock is not an Indian and that this cause of action arose outside the exterior boundaries of the Indian reservation. These two facts distinguish this case from those cases which have granted Tribal Court jurisdiction. Where the cause of action arose on Indian land and/or the defendant is Indian, Tribal Court jurisdiction is appropriate. This is not such a case, and the New Mexico District Court has jurisdiction over the plaintiff, the defendant and this cause of action.

Respectfully Submitted,

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